ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-98
Petition of MCI for Declaratory Ruling	)	CCBPol 97-4
That New Entrants Need Not Obtain	)	
Separate License or Right-To Use	)	
Agreements Before Purchasing	)	
Unbundled Elements	)	

OPPOSITION OF GTE SERVICE CORPORATION TO MCI PETITION FOR DECLARATORY RULING

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone operating companies, hereby files this Opposition to the Petition filed by MCI Telecommunications Corp. ("MCI") in the above-captioned matter.[1] The third party licensing issues raised in MCI's Petition pertain to state arbitration proceedings and statements of generally available terms ("SGATs"). Because, under the Telecommunications Act of 1996, these state decisions can only be reviewed in federal district court, the Commission lacks authority to rule on MCI's claims. Moreover, although MCI requests that the Commission use its Section 253 preemption authority, MCI cites no state statute, regulation, or legal requirement that could be preempted by the Commission and does not explain how requiring competitive local exchange carriers

[1] MCI Petition for Declaratory Ruling, CC Docket No. 96-98 (filed Mar. 11, 1997) ("MCI Petition").

("CLECs") to pay for the intellectual property they want to utilize constitutes a barrier to entry.

Even if the Commission had authority to rule on MCI's Petition, MCI's proposal would put unreasonable burdens on incumbent local exchange carriers ("ILECs") and prevent third party intellectual property vendors from obtaining appropriate revenues from the use of their products or services. Both resale of ILEC services and sales of unbundled network elements ("UNEs") may implicate third party intellectual property, including technology licenses with vendors. In some cases, CLECs will need to secure licenses from third party vendors in order to purchase resale services and UNEs. CLECs are in the best position to negotiate any necessary licenses because they will know how they intend to use the intellectual property and the level of usage expected by their customers. Requiring ILECs to negotiate on behalf of CLECs would be unreasonable for a number of reasons, including the fact that ILECs will not know what terms CLECs will find acceptable and third party vendors are not subject to Commission authority and are thus not obligated to come to an agreement with the ILEC. For these reasons, MCI's Petition should be denied.

I. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO RULE ON THE ISSUES MCI HAS RAISED.

Based on its experiences with one carrier, MCI complains that "ILECs have continued to insist that their would-be competitors obtain licenses or right-to-use agreements associated with every network element to which a CLEC requests access"

in state arbitration proceedings and SGATs.[2] MCI goes on to request sweeping relief: that "the Commission should issue a declaratory ruling that new entrants need not obtain separate license or right-to-use agreements before they can purchase unbundled network elements, and that any requirement that they do so violates §§ 251 and 253 of the Act."[3] However, as the language of the Act makes clear, the appropriate forum for this issue is federal district court, not this Commission.

Section 252(e)(6) of the Act states as follows:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.[4]

Since Section 252 encompasses both agreements reached in arbitrations and SGATs, if MCI believes that a state commission has made an incorrect decision during an arbitration or has approved an SGAT with terms that violate the Act, its sole remedy is to file suit in the appropriate federal district court. Nowhere did Congress provide for these state court decisions to be reviewed by the Commission. Therefore, the Commission has no authority under Sections 251 or 252 to make the requested declaratory ruling.

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[2] MCI Petition at 3-4 (emphasis omitted). MCI fails to note that SGAT requirements relate only to Bell Operating Companies, not all ILECs.

[3] MCI Petition at 10.

[4] 47 U.S.C. § 252(e)(6).

MCI also requests that the Commission issue a declaratory ruling under Section 253 of the Act. However, Section 253 does not provide for the enunciation of general policies. Rather, Section 253(d) states that:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[5]

MCI has not identified any particular state "statute, regulation, or legal requirement" which "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[6] Consequently, the Commission does not have authority under Section 253 to take the action MCI requests.

II. RESALE OF ILEC SERVICES AND SALE OF UNES HAVE SERIOUS IMPLICATIONS FOR LICENSES OF THIRD PARTY INTELLECTUAL PROPERTY.

MCI's assertion that third party rights are not generally affected by the purchase of UNEs[7] is flatly incorrect. GTE has many licenses with third parties for various intellectual property which is used in and is an integral part of GTE's networks. It is wrong to suggest that third party rights and GTE's obligations are not affected by these licenses. Although some unbundled elements (for instance, access to GTE network

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[5] 47 U.S.C. § 253(d).

[6] 47 U.S.C. § 253(a).

interface devices) do not implicate any third party licenses, access to other unbundled elements, which utilize third party intellectual property, would be restricted.

In those cases concerning unbundled elements which utilize third party intellectual property, GTE's licenses have strict provisions that do not allow GTE to grant any other parties access to the intellectual property. For example, the Commission has ordered GTE to allow CLECs to access its advanced intelligent network ("AIN") Service Creation Environment. The AIN technology requires the use of third party proprietary software which has been licensed to GTE. GTE has been told specifically by one of its AIN technology vendors that under the terms of the license GTE has with the vendor, GTE is precluded from allowing any other party access to this proprietary software.

In another example, access to and use of Line Information Data Base ("LIDB") storage capabilities is controlled by third party licensing arrangements, thereby potentially affecting CLEC access to operations support systems functions and call-related database UNEs. In addition, a supplier of digital synchronization equipment ("DSE") has recently informed GTE that under any license it might grant to GTE for the right to use the embedded software which operates the equipment, GTE will be precluded from permitting such equipment to be operated for the benefit of other carriers; these carriers must apply directly to the vendor for licenses. DSE synchonizes switches, SONET, and digital access and cross connect systems ("DACS") and

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(...Continued)

[7] MCI Petition at 6-7.

provides a higher quality digital network for customers. Thus, the vendor's licensing arrangement will affect access to and use of operations support systems.

In the resale context, some of GTE's licenses restrict reselling services involving the licensed intellectual property if the resale provider combines the resold services with other software or hardware not provided by the third party vendor. Thus, in order for a CLEC to have access to the AIN Service Creation Environment or to combine GTE's resold services with other software or hardware and ensure that GTE remains in compliance with its license obligations, the CLEC will need a separate license from the vendor.[8] Other GTE licenses with third parties for use of their intellectual property may have similar prohibitions and restrictions.

A separate license will not be required in all cases in which the license has restrictive provisions. In some cases, whether a separate license is necessary will depend on the scope of the license or the type of access the CLEC requires to the third party intellectual property. However, in other cases, including licensing agreements recently proposed by third party vendors to GTE, the license includes clear language that precludes GTE from authorizing use by other carriers. Thus, although many licenses will be affected by both resale of services and sale of UNEs, the need for additional licenses will vary depending upon the terms of the original license and the access CLECs will require.

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[8] It is GTE's experience that licensors vigorously enforce their intellectual property rights and compliance with license obligations.

III. ILECS SHOULD NOT BE RESPONSIBLE FOR OBTAINING NECESSARY LICENSES FOR CLECS.

As described above, in some cases new licenses or additional license rights for third party intellectual property may be required for CLECs to use unbundled elements or to acquire ILEC services for resale. ILECs cannot be responsible for negotiating such licenses on behalf of CLECs. In its *Second Interconnection Order* considering network disclosure requirements, the Commission stated:

> [i]f an interconnecting carrier or information service provider requires genuinely proprietary information belonging to a third party in order to maintain interconnection and interoperation with the incumbent LEC's network, the incumbent LEC is permitted to refer the competing service provider to the owner of the information *to negotiate directly* for its release. While the incumbent LEC might represent the most expedient source of the required information, third parties would be less able to protect themselves from misuse of their proprietary information and preserve potential remedies if the incumbent LEC were to disclose directly a third party's proprietary information directly in response to a request.[9]

The considerations and issues raised by third party intellectual property licensing situations are similar to those surrounding network disclosure. However, because licensing depends upon disclosure to and use of the third party intellectual property by the CLECs and their agreement to abide by certain restrictions, the balance weighs even more heavily toward requiring CLECs to negotiate license agreements on their own behalf. Requiring CLECs to negotiate their own licenses will not put them under

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[9] *Second Report and Order and Memorandum Opinion and Order*, CC Docket No. 96-98, ¶ 257 (rel. Aug. 8, 1996) (emphasis added).

any greater burden than the Commission has already determined is reasonable under the network disclosure rules.

It is also unreasonable to require ILECs to negotiate licenses for CLECs because, although the ILEC can attempt to negotiate a license, third party vendors of intellectual property (which are not subject to Title II-type regulation) will not be obligated to come to an agreement, and the obligations in the licenses may be more burdensome and restrictive than the CLECs are willing to assume. If ILECs are forced to attempt to negotiate these agreements on behalf of CLECs, they will incur negotiation costs which will then have to be passed along to CLECs even if no agreement is reached. In addition, if ILECs were to negotiate agreements for CLECs, the potential for disputes arises over whether the ILEC obtained the best rate and terms possible, needlessly burdening state commissions with these issues.[10]

Because each CLEC has the best knowledge of how it intends to use the third party intellectual property and how many subscribers it will serve using that property, it will be in the best position to negotiate appropriate terms with each licensor. In addition, third party licensors will want to negotiate terms and conditions based on the CLEC's use of their intellectual property and other concerns that the third party may have regarding the use. For example, the license fee GTE pays the third party is many times based on the level of usage of the intellectual property and the size of GTE and

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[10] MCI states that the cost of these additional licenses should be shared by all CLECs. MCI Petition at 9. However, MCI ignores the fact that each CLEC will be using the licensed intellectual property to meet its individual needs. Thus, different terms could be required for each license – one additional generic license will not cover all CLECs and their individual needs.

its affiliates. If GTE's usage increases or the size of GTE and its affiliates increases, then the license fees payable to the third party will also increase. Each CLEC undoubtedly will develop its own business plan, which will affect the usage of the third party intellectual property. Accordingly, licensors will insist on negotiating terms with each CLEC that reflect the type and extent of utilization of the licensed intellectual property by that CLEC.

MCI is wrong to assert that third party vendors may have an incentive not to license their intellectual property because of the hypothetical possibility of pressure from ILECs.[11] There is no reason to believe either that such pressure would occur,[12] or that it would be successful. With increased usage of new services, many of which involve third party intellectual property, these vendors stand to earn additional revenues from new licensing agreements with other carriers. As a result, third party vendors have every incentive to come to an agreement with the CLEC. Moreover, the majority of GTE's licenses with third party vendors of intellectual property are nonexclusive, which means that unless the third party has granted exclusive rights to some other licensee, it has always had the option of licensing the same intellectual property to other customers.

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[11] MCI Petition at 5.

[12] ILECs have already invested significant sums purchasing the hardware, paying licensing fees, and developing software necessary to take advantage of the licensed intellectual property. They cannot simply threaten to abandon this investment if they do not like the vendor's conduct. In addition, with increased competition, ILECs will have no choice but to invest in the best intellectual property, regardless of which vendor licenses it.

IV. CONCLUSION

Because the Act states that issues arising from arbitrations and SGATs are to be reviewed only in federal district court and because CLECs should be responsible for negotiating any licenses required to use ILEC services or UNEs, GTE urges the Commission to dismiss MCI's Petition and refrain from putting unreasonable burdens on ILECs.

Respectfully submitted,

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on behalf of its affiliated domestic telephone operating companies

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April 15,1997

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1997, I caused copies of the foregoing OPPOSITION OF GTE SERVICE CORPORATION TO MCI PETITION FOR DECLARATORY RULING to be served via first class mail, postage prepaid, on:

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